Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-172

JOHN F. KENNEDY and ROSEMARY KENNEDY, his wife, and JAMES R. MELINSON and MONICA MELINSON, his wife, and RICHARD J. BRAEMER and TONI BRAEMER, his wife, and all Parents of Nonpublic School Students, similarly situated,

Petitioners,

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,
GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania,
HENRY E. CROUTER, Intervenor,
JOSE DIAZ, *et al.*, Intervenors,

Respondents.

BRIEF OF PLAINTIFFS-RESPONDENTS ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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This brief is submitted in opposition to the petitions for writ of certiorari filed in this matter by John F. Kennedy, *et al.* and by the Pennsylvania Parent Assistance Authority.

We address ourselves herein briefly to the substantive issue raised in these petitions for certiorari, noting only that serious procedural and jurisdictional questions are also present—questions involving the standing of petitioners to seek modification of a judgment in a suit to which they were not parties, the legal existence today of the petitioner Pennsylvania Parent Assistance Authority, the justiciability in the federal courts of a controversy between a state agency and the state which established it and similar formidable barriers to this suit or proceeding, whatever its nature might be.

Efforts to evade or frustrate particular decisions of this Court upholding claims asserted under the Bill of Rights are hardly new. The most notable instances, of course, are in the arena of racial equality, where the means used have included such devices as Grandfather Clauses, racial restrictive covenants, poll taxes and separate but equal facilities. Closer to home are efforts aimed at bringing religious teachings or practices into the public schools, notwithstanding this Court's decisions in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); and *Abington School District* v. *Schempp,* 374 U.S. 203 (1963). See, *e.g., DeKalb School District* v. *DeSpain,* 255 F. Supp. 655, *aff'd* 384 F. 2d 836, *certiorari denied* 390 U.S. 906 (1968); *Stein* v. *Oshinsky,* 224 F. Supp. 757, *aff'd* 348 F. 2d 999, *certiorari denied* 382 U.S. 957 (1965); *Board of Education of Netcong, N.J.* v. *State Board of Education,* 108 N.J. Super. 564, 262 A.2d 21, 57 N.J. 172, 270 A. 2d 412, *certiorari denied* 401 U.S. 1013 (1971).

With one significant difference, the present suit marks another instance of a campaign of evasion leveled against

a decision of this Court, this time in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971). See, *e.g., Levitt* v. *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Marburger* v. *Public Funds for Public Schools,* 412 U.S. 916, 413 U.S. 916 (1973), 417 U.S. 961 (1974); *Meek* v. *Pittenger,* 421 U.S. 349 (1975). The difference between these instances and the present one is that the latter is not an effort by the state, through its legislative or executive branches, but rather to its credit is resisted by the state.

Ever since *Marbury* v. *Madison,* 1 Cranch 137 (1803), it has been the universal assumption that except in extraordinary cases, a statute unconstitutional on its face does not give rise to rights and claims enforceable after its unconstitutionality has been adjudicated. This assumption is based upon the premise that the courts do not make the statute unconstitutional but only declare its unconstitutionality. The principle is applicable to adjudications of unconstitutionality under the Establishment Clause of the First Amendment no less than under other provisions of the Constitution. Applying that principle in *Marburger* v. *Public Funds for Public Schools, supra,* the District Court went further than the courts below in the present case. It required the nonpublic schools to turn back to the state the benefits they had received under the invalidated statute.

All the petitioners herein rely exclusively on *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*); they cite no other authority in support of their claim. But an examination of the plurality opinion in that case reveals that, rather than supporting the claim, the decision is directly

contrary to it. In that case, this Court did not mandate that the judgment of unconstitutionality be given only prospective effect. It held only that, in the absence of clear abuse of discretion, it would not reverse the decision of the trial court to limit the judgment prospectively. The Court's language is unambiguous (411 U.S. at 200):

> In shaping equity decrees, the trial court is vested with broad discretionary powers, and the appellate review is correspondingly narrow.

In the present case, the trial court exercised its discretion not to limit the judgment prospectively from the time of affirmance by this Court. Plainly, this cannot be deemed an abuse of discretion; hence, it is not subject to appellate rescission.

Moreover, in *Lemon II*, there had been reasonable ground for the legislature to believe that the statute it enacted might be adjudged constitutional by this Court in view of its prior decisions in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The legislative effort was not to evade existing decisions of this Court but at most to extend their holdings. That effort could not be adjudged unreasonable in view of the broad language of the opinion in the latter case, language which could be viewed as requiring a result contrary to that ultimately reached by the majority of this Court. In the present case, nothing in *Lemon II* or *Earley* v. *DiCenso* or any other post-*Allen* decision of this Court could be construed as affording ground for belief that the statute here in issue would be upheld.

We note further that, in *Lemon II*, this Court determined that, under all the circumstances, it could not be held as a matter of law that the defendants acted unreasonably in relying upon the validity of the statute until it was adjudged unconstitutional by this Court. *In that case, however, the District Court had upheld the constitutionality of the statute; in the present case it ruled it invalid.* It would be a startling innovation in our legal system were the Court to hold that parties may rely upon anticipated appellate reversal of a lower court decision and demand indemnification if their anticipation proves incorrect.

Finally, we suggest that acceptance of the petitioners' premise in this case would make a nullity of the Establishment Clause as it applies to financing of church schools. All that a state need do is enact even a patently unconstitutional aid statute and wait for a judicial challenge to its constitutionality to be launched. How that challenge would be determined would be of little significance. Even if the statute were held unconstitutional by all the courts, called upon to pass on it, including this Court, not only would be sums previously paid thereunder be retained, but the beneficiaries would be entitled to receive all the moneys not paid to them until this Court's final disposition. At that point the game could be started all over by the simple expedient of passing another statute, slightly different in wording but seeking the same unconstitutional end of financing church school out of tax-raised funds. We do not believe that in deciding *Lemon II* this Court intended to countenance that game.

For the reasons set forth, the petitions for writs of certiorari herein should be denied.

Respectfully submitted,

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